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## HELPING DAVID FIGHT GOLIATH: PRESERVING THE WTO IN THE TRUMP ERA

MICHAEL GOODYEAR\*

*The Trump presidency and other reactionary conservative governments present an immensely powerful danger to the World Trade Organization (WTO). The WTO is largely built on Members' willingness to comply with its rules, and the current Dispute Settlement Understanding (DSU) is too weak to deter an avowed enemy of the WTO, such as President Trump. This poor enforcement system particularly hurts developing countries, which lack the power under the DSU to effectively deter economic giants like the United States.*

*The recent Doha Round was supposed to create a more effective enforcement mechanism under the DSU, but it fell apart before any such changes could be made. The most prominent alternatives raised in the Doha Round are ultimately problematic because either they do not address the weakness of retaliation under the DSU or they are unlikely to be approved by the WTO Membership. A new and more plausible suggestion would be the creation of a repeat violator policy, which would provide for much stronger retaliation against those Members who repeatedly disregard the WTO Agreement. Such a policy would be especially aimed at serious threats to the WTO, such as the Trump administration, and could likely be achieved without going through the formal amendment process, making it the most viable measure for countering these new threats to the WTO.*

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\* J.D. Candidate, University of Michigan Law School (2020); A.B., University of Chicago (2016). I would like to thank Professor Donald Regan for his guidance and invaluable knowledge of the ins and outs of the WTO, both in class and in relation to this paper in particular. I would also like to thank the editors of *Trade, Law and Development*, especially Radhika Parthasarathy and Ipsiatia Gupta, for their thoughtful and helpful comments throughout the editing process. The author may be contacted at mgoodyea[at]umich.edu.

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## I. INTRODUCTION

Despite the well-established economic wisdom of lowering tariffs and improving access to free trade,<sup>1</sup> in recent years countries have reverted to protectionism.<sup>2</sup> Pundits think developing countries need tariffs to counter rich countries' subsidies, which they cannot afford.<sup>3</sup> Yet, it is actually the wealthier countries that are leading this tariff trend.<sup>4</sup> In particular, American President Donald J. Trump has been increasing tariffs with alarming alacrity.<sup>5</sup>

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<sup>1</sup> See Arthur S. Guarino, *The Economic Effects of Trade Protectionism*, FOCUS ECONOMICS (Mar. 1, 2018), <https://www.focus-economics.com/blog/effects-of-trade-protectionism-on-economy>; PAUL KRUGMAN ET AL., INTERNATIONAL ECONOMICS: THEORY & POLICY 25-26 (9th ed. 2012).

<sup>2</sup> See *Rate of New Trade Restrictions from G20 Economies Doubles Against Previous Period*, WORLD TRADE ORG. (July 4, 2018), [https://www.wto.org/english/news\\_e/news18\\_e/monit\\_04jul18\\_e.htm](https://www.wto.org/english/news_e/news18_e/monit_04jul18_e.htm) [hereinafter *Rate of New Trade Restrictions*].

<sup>3</sup> Stephen Devadoss, *Why Do Developing Countries Resist Global Trade Agreements?*, 15(2) J. INT'L TRADE & ECON. DEV. 191, 204-05 (2006).

<sup>4</sup> *Rate of New Trade Restrictions*, *supra* note 2.

<sup>5</sup> Bob Bryan, *Trump's Trade War with China is Intensifying*, BUSINESS INSIDER (Aug. 23, 2018), <https://www.businessinsider.com/trump-tariffs-what-is-a-tariff-meaning-for-prices-consumer-2018-3>.

Developing countries have been a major focus of the World Trade Organization (WTO), which specifically sought to protect them during the Doha Round.<sup>6</sup> The Doha Declaration was in part based on creating separate, looser liberalized trade standards for developing countries in order for them to achieve their development needs.<sup>7</sup> Despite this focus, these countries are now at greater risk not because of the existing WTO rules, but because larger, wealthier countries will not follow those rules.<sup>8</sup>

Under its Dispute Settlement Understanding (DSU), the WTO has a structured system to address any violations of the WTO's founding agreement, the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).<sup>9</sup> If a Member is found to violate the WTO Agreement and refuses to come into compliance, the complaining Member's only retaliatory weapon is suspending concessions or imposing tariffs of its own in retaliation.<sup>10</sup>

The retaliation remedy for WTO violations has already been criticized for providing a poor tool for smaller countries,<sup>11</sup> and offering less than what a country could gain under public international law.<sup>12</sup> The current WTO system responds to persistent WTO violations by allowing the injured country to retaliate against the violator by imposing higher tariffs. But if the injured country is small, the strength of even an extremely high tariff against an economic giant such as the United States or China would be unlikely to cause those countries to change their policies because the economic effect would be so negligible. However, despite recommendations for the WTO to adopt an alternative mode of punishment for violating countries, including the introduction of financial damages,<sup>13</sup> and class

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<sup>6</sup> World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 2, 3, WTO Doc. WT/MIN (01)/DEC/1 [hereinafter Doha Declaration].

<sup>7</sup> *Id.* ¶ 13.

<sup>8</sup> See Mukhisa Kituyi, *A Trade War Will Hit Developing Countries the Hardest*, JAPAN TIMES (June 19, 2018), <https://www.japantimes.co.jp/opinion/2018/06/19/commentary/world-commentary/trade-war-will-hit-developing-countries-hardest/#.W6Ka35NKho4>.

<sup>9</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>10</sup> *Id.* at art. 22.

<sup>11</sup> Fabien Besson & Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis*, ECOMOD (2004), <https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf>.

<sup>12</sup> See Marco Bronckers & Freya Baetens, *Reconsidering Financial Remedies in WTO Dispute Settlement*, 16 J. INT'L ECON. L. 281, 298-99 (2013).

<sup>13</sup> *Id.* at 299-300.

actions,<sup>14</sup> retaliation has remained the lone weapon of WTO Members against violations.

Retaliation was effective as a threat to help lower average tariffs from 40% at the end of World War II to 5% by 2003.<sup>15</sup> However, the WTO system is largely based on willingness to comply and it works towards a common goal of lowering tariffs on a global scale.<sup>16</sup> The Trump presidency poses a unique and dangerous problem to this structure. President Trump has already threatened to withdraw from the WTO,<sup>17</sup> demonstrating the shakiness of the world's largest economy's commitment to the WTO and its goals. In response to American tariffs on steel and aluminium, a host of countries, including China, the European Union, and Russia initiated disputes at the WTO.<sup>18</sup> In addition, several of these countries unilaterally imposed retaliatory tariffs against the United States without waiting for a dispute resolution from the WTO.<sup>19</sup>

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<sup>14</sup> Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25(1) EMORY L. REV. 152, 158-59 (2011) [hereinafter Cai].

<sup>15</sup> William Davey, *The World Trade Organization: A Brief Introduction*, in INTERNATIONAL TRADE LAW 87, 89 (Joost Pauwelyn et al., 3rd ed. 2016) [hereinafter Davey].

<sup>16</sup> See Jappe Eckhardt & Manfred Elsig, *Support for International Trade Law: The US and the EU Compared*, 13(4) INT'L J. CON. L. 966, 967-68 (2016).

<sup>17</sup> Christine Wang, *Trump Threatens to Withdraw from World Trade Organization*, CNBC (Aug. 20, 2018), <https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html>.

<sup>18</sup> Request for Consultations by China, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/1 (Apr. 5, 2018); Request for Consultations by India, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/1 (May 18, 2018); Request for Consultations by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/1 (June 1, 2018); Request for Consultations by Canada, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS550/1 (June 1, 2018); Request for Consultations by Mexico, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/1 (June 5, 2018); Request for Consultations by Norway, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/1 (June 12, 2018); Request for Consultations by Russia, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/1 (June 29, 2018); Request for Consultations by Switzerland, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/1 (July 9, 2018); Request for Consultations by Turkey, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/1 (Aug. 15, 2018).

<sup>19</sup> Request for Consultations by the United States, *Canada — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS557/1 (July 16, 2018); Request for Consultations by the United States, *China — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/1 (July 16, 2018); Request for Consultations by the United States, *European Union — Additional Duties on Certain Products from the United States*,

Most of the WTO regime hinges on trust, and without an effective enforcement mechanism, an anti-WTO leader of a large country, such as President Trump, will undermine the entire organization.<sup>20</sup> This Note will first explain the values and structure of the WTO. It will then discuss the dispute resolution system under the DSU, as well as its advantages and shortcomings. It will also discuss several alternative enforcement methods suggested by WTO Member states and scholars, which will include TRIPS cross-retaliation and collective retaliation. While each of these methods have potential, there is another solution specifically designed for Members who repeatedly breach the WTO Agreement: a repeat violator policy. This Note suggests using the repeat violator policy as a possible solution. It would provide a graduated response by the WTO to increased non-compliance by Member states, imposing much stronger retaliatory measures on consistent violators to strengthen the ability of developing countries to fight WTO non-compliance. This will in turn raise the chances of wealthy countries coming back into compliance with the WTO rules.

## II. SPECIAL AND DIFFERENTIAL PRINCIPLE OF THE WTO AGREEMENT

The WTO Agreement created the WTO in 1994 with the goal of “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services”.<sup>21</sup> At the same time, it was “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at

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WTO Doc. WT/DS559/1 (July 16, 2018); Request for Consultations by the United States, *Mexico — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS560/1 (July 16, 2018); Request for Consultations by the United States, *Turkey — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS561/1 (July 16, 2018); Request for Consultations by the United States, *Russia — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS566/1 (Aug. 27, 2018); see also Marc L. Busch, *What Trump’s Trade War Could Mean for the WTO and Global Trade*, HARV. BUS. REV. (June 7, 2018), <https://hbr.org/2018/06/what-trumps-trade-war-could-mean-for-the-wto-and-global-trade>; Doug Palmer, *U.S. Launches 5 WTO Cases Against Retaliatory Tariffs*, POLITICO (July 16, 2018), <https://www.politico.com/story/2018/07/16/us-challenges-retaliatory-tariffs-at-the-wto-1578925>.

<sup>20</sup> See e.g., Jakob Hanke, *Europe Fears Trump Is Out to Kill the World Trade Organization*, POLITICO (Mar. 18, 2018), <https://www.politico.eu/article/wto-donald-trump-protectionism-brussels-fears-trump-wants-the-wto-to-fail/>.

<sup>21</sup> Marrakesh Agreement Establishing the World Trade Organization pmbl., (Apr. 15, 1994), 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

different levels of economic development”.<sup>22</sup> The overarching purposes of the WTO Agreement are the “substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations”.<sup>23</sup> The WTO Agreement incorporates the General Agreement on Tariffs and Trade 1994 (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and associated legal instruments, and binds all WTO Members to them.<sup>24</sup>

In particular, the WTO Agreement carves out protections for developing countries, the so-called “special and differential treatment provisions”.<sup>25</sup> The preamble of the WTO Agreement stipulated that there is a “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”<sup>26</sup> They “will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities”.<sup>27</sup> Under the previous GATT regime, the Members even agreed to make exceptions to the Most Favoured Nation requirement,<sup>28</sup> one of the central requirements of the GATT, for developing countries.<sup>29</sup>

### III. DISPUTE SETTLEMENT UNDER THE WTO

The WTO is relatively rare among international institutions in actually having an enforcement mechanism.<sup>30</sup> This fact alone sets the WTO out as a potential

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at art. II(2) (encompassing the WTO Agreement and Annexes 1, 2, and 3). The exception is Annex 4, which contains plurilateral agreements that are binding only on those countries that have accepted them, *id.* at art. II(3).

<sup>25</sup> *Special and Differential Treatment Provisions*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm).

<sup>26</sup> WTO Agreement, *supra* note 21, at pmb1.

<sup>27</sup> WTO Agreement, *supra* note 21, at art. XI(2).

<sup>28</sup> General Agreement on Tariffs and Trade, art. 1, Oct. 30, 1947, 64 U.N.T.S. 187.

<sup>29</sup> Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203-05 (1989) [hereinafter Enabling Clause].

<sup>30</sup> Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121(2) YALE L.J. 252, 266 (2011).



example of how to enforce future international agreements.<sup>31</sup> The WTO Agreement establishes a complaint process, panels, and an Appellate Body to administer disputes and sets up procedures for holding those countries accountable that violate the WTO.<sup>32</sup>

All trade disputes between WTO Members are regulated through the DSU, which is itself a part of the WTO Agreement.<sup>33</sup> The WTO's Dispute Settlement Body (DSB) administers all disputes under the WTO Agreement and gives the mechanism to preserve the rights and obligations of WTO Members.<sup>34</sup> In this role, the DSB establishes panels for reviewing disputes, adopts Panel and Appellate Body reports on the disputes, maintains surveillance over implementation of rulings and recommendations from the Panels and Appellate Body, and authorizes the suspension of concessions and other obligations under the WTO Agreement.<sup>35</sup>

In any WTO dispute, the two Members must first consult with each other to find a solution before having a Panel adjudicate the dispute.<sup>36</sup> Any party to the dispute can request good offices, conciliation, or mediation at any time and if the parties agree, they can continue to consult while the panel process proceeds.<sup>37</sup> If consultation fails, the complaining party may request a Panel to adjudicate the dispute.<sup>38</sup> After receiving arguments from both sides and gathering relevant information, the Panel will issue its interim report to the parties for comments.<sup>39</sup> The Panel will meet with the parties to discuss any comments and will then circulate its final report to all the WTO Members.<sup>40</sup> If there is no consensus among WTO Members to reject the Panel report, the report will then be referred to the DSB for formal adoption.<sup>41</sup> However, if one of the parties has filed for appeal, the Panel report will not be considered for adoption until after the Appellate Body

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<sup>31</sup>Matus Stulajter, *Problem of Enforcement of an International Law – Analysis of Law Enforcement Mechanisms of the United Nations and the World Trade Organization*, 33(2) J. MOD. SCI. 325, 330–32 (2017).

<sup>32</sup>DSU, *supra* note 9.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at art. 2, 3.

<sup>35</sup>*Id.* at art. 2.

<sup>36</sup>*Id.* at art. 4.

<sup>37</sup>*Id.* at art. 5.

<sup>38</sup>*Id.* at art. 6.

<sup>39</sup>*Id.* at art. 15.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at art. 16.

rules on the dispute.<sup>42</sup> After hearing the dispute, the Appellate Body's report will go through the same formal adoption process as a Panel report.<sup>43</sup>

If the Panel or Appellate Body finds a Member's trade measure to be inconsistent with the WTO Agreement, it will recommend that the Member should conform to the Agreement and may suggest ways in which the Member could implement the recommendations.<sup>44</sup> If the adopted report recognizes a WTO infringement, the infringing Member has a duty to comply with the recommendations and rulings of the DSB to remedy it.<sup>45</sup> The recommendations and rulings must be implemented within fifteen months (unless the parties extend this time due to exceptional circumstances), the DSB will observe the Member's implementation of the adopted recommendations or rulings, and any Member can raise the issue of non-adoption at any time.<sup>46</sup>

If the Member fails to implement the recommendations and rulings within a reasonable time, the DSU authorizes compensation or the suspension of concessions or other obligations under Article 22.<sup>47</sup> The purpose of Article 22 is to induce compliance.<sup>48</sup> At first, the parties will discuss adequate compensation for the violating Member's continued non-compliance.<sup>49</sup> If these negotiations fail, the complainant may then request authorization from the DSB to retaliate by temporarily suspending concessions or other obligations to the violating Member.<sup>50</sup> The type of concessions that will be suspended will be influenced by the trade sector under which the Panel or Appellate Body found the violation, the broader economic elements related to the suspension of the concession, and the degree of the violation.<sup>51</sup>

#### IV. EVALUATING THE CURRENT DSU

##### *A. Advantages of the DSU*

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at art. 17.

<sup>44</sup> *Id.* at art. 19.

<sup>45</sup> *Id.* at art. 21.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at art. 22.1.

<sup>48</sup> *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, ¶ 76, WTO Doc. WT/DS27/ARB/ECU (adopted Mar. 24, 2000) [hereinafter *EC — Bananas* (22.6)].

<sup>49</sup> DSU, *supra* note 9, at art. 22.2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at art. 22.3.

While the exact impact of the differences between the GATT, 1947 and the DSU, 1994 has perhaps been overstated,<sup>52</sup> these changes are undoubtedly important advances.<sup>53</sup> For starters, the WTO is an actual organisation, which gives it logistical support, financing, and a structure.<sup>54</sup> Furthermore, the WTO Agreement established the WTO Secretariat to perform administrative duties.<sup>55</sup> The GATT system did not supply any of these things, effectively having a dispute settlement body that was in a holding pattern for nearly fifty years.<sup>56</sup> The WTO also has an appellate process and more easily allows adverse decisions to be approved by the DSB. In addition, while the GATT only covered its namesake agreement, the DSU covers all agreements contained within the WTO Agreement, including the GATS, the TRIPS, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the Agreement on Technical Barriers to Trade (TBT).<sup>57</sup>

Perhaps most importantly, the WTO Agreement removed the unanimous consent rule for adopting panel decisions.<sup>58</sup> The dispute resolution system under GATT had no formal structure and all reports had to be affirmed by consensus among all GATT Members, which made it nearly impossible for the GATT reports to be implemented.<sup>59</sup> Therefore, a losing defendant, who was after all a Member itself, could just block the report, preventing it from being approved.<sup>60</sup> The DSU removed the consensus requirement and provided for the adoption of all panel decisions, provided that a majority of WTO Members did not oppose the

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<sup>52</sup> See Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC* 457, 464 (Daniel M. Kennedy & James D. Southwick eds., 2002).

<sup>53</sup> See *Historic Development of the WTO Dispute Settlement System*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c2s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s2p1_e.htm) (last visited Apr. 9, 2019).

<sup>54</sup> See Davey, *supra* note 15, at 99-100.

<sup>55</sup> WTO Agreement, *supra* note 21, at art. VI; DSU, *supra* note 9, at art. 8.4, 27. For example, the Secretariat assists in the dispute resolution process by maintaining a list of potential individuals to serve on panels and assisting the panels with research, secretarial, and technical support.

<sup>56</sup> Davey, *supra* note 15, at 89-90.

<sup>57</sup> DSU, *supra* note 9, at art. I. This is vital in enforcing the entire WTO Agreement. In addition, the service and intellectual property sectors are substantially more important now than in 1947, having vastly increased in size compared to their nascent levels in the middle of the twentieth century. PAUWELYN ET AL., *INTERNATIONAL TRADE LAW* 90 (3d ed., 2016) [hereinafter PAUWELYN ET AL.].

<sup>58</sup> DSU, *supra* note 9, at art. XI.

<sup>59</sup> PAUWELYN ET AL., *supra* note 57, at 90.

<sup>60</sup> See *id.* at 129.

adoption.<sup>61</sup> This meant that panel decisions would actually be adopted and could not be struck down by the violating Member itself.

Finally, the DSU provided for an Appellate Body to review panel decisions, which had not existed under the GATT.<sup>62</sup> The existence of an Appellate Body allows corrections for unfair or ill-considered decisions by the panels.<sup>63</sup> It also allows a permanent body to develop precedent for the future, which guides panels, which are only created for the individual dispute, in adjudicating disputes.<sup>64</sup> Furthermore, the existence of an Appellate Body adds legitimacy to the dispute settlement process and increases the likelihood that WTO Members will respect the final report.<sup>65</sup>

### *B. Problems with the DSU*

While the DSU is certainly an improvement on the old GATT dispute settlement system, it still has several weaknesses. Potential improvements to the DSU have been considered practically since the signing of the WTO Agreement, and have featured prominently in the Doha Round.<sup>66</sup>

Like the GATT, the DSU is largely premised on political willingness for compliance. The current WTO system does not work unless countries are inclined to cooperate.<sup>67</sup> This is in part due to the weakness of the DSU sanction system. With sanctions limited to retaliation, the DSU does not have serious enough teeth to cow a determined and powerful country from breaching the WTO.<sup>68</sup> This is a particular problem now, given the reluctance of prominent world leaders to follow the WTO.<sup>69</sup> Back in 2014, even before Trump became U.S. President, countries

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<sup>61</sup> DSU, *supra* note 9, at art. XI.

<sup>62</sup> PAUWELYN ET AL., *supra* note 57, at 135.

<sup>63</sup> ANNE MARIE LOFASO, A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY, 3–4 (2010).

<sup>64</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 158 WTO Doc. WT/DS344/AB/R (adopted Apr. 30, 2008).

<sup>65</sup> Claus-Dieter Ehlermann & Donald M. McRae, *Reflections on the Appellate Body of the World Trade Organization (WTO)*, 97 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 77, 80 (2003).

<sup>66</sup> THOMAS A. ZIMMERMANN, NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 93 (2006) [hereinafter Zimmermann].

<sup>67</sup> SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM: WHO'S ON FIRST? 238 (1997).

<sup>68</sup> See Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* 31 (Eur. U. Ins. Working Paper No. LAW 2017/11) [hereinafter Reich].

<sup>69</sup> See, e.g., Edward Helmore, *Trump: US Will Quit World Trade Organization Unless It 'Shapes Up'*, THE GUARDIAN (Aug. 30, 2018), <https://www.theguardian.com/us-news/2018/aug/30/trump-world-trade-organization-tariffs-stock-market>.

complied with dispute settlement rulings only ninety percent of the time.<sup>70</sup> Even though ninety percent may seem like a high number, it still shows that the U.S. selectively chooses when it will comply or not, whether for policy reasons or because it does not fear retaliation from the injured country. Additionally, between 1995 and 2005, the rate of actual full compliance was much lower, only amounting to nine percent.<sup>71</sup> The current retaliation regime has been criticized as ineffective and even counter-productive to the goal of the WTO Agreement.<sup>72</sup>

One worry is that wealthier countries could just price out of WTO compliance.<sup>73</sup> If the compensation or retaliation endured for the violation is lower than the profit gained from non-compliance, countries would be tempted to simply pay the price of violation, even if this choice decreased overall wealth for the world.<sup>74</sup> This price-out system benefits wealthier developed countries that can afford to eat the costs of non-compliance while forcing poorer developing countries to simply endure the violations.<sup>75</sup> In fact, large democratic states are far less likely to comply with the WTO Agreement than economically smaller states.<sup>76</sup> Litigation costs are a further impediment to developing countries pursuing WTO dispute resolution.<sup>77</sup>

The current dispute settlement enforcement methods of compensation and retaliation do not benefit developing countries very much because they do not have the economic clout to force stronger countries to follow the WTO rules. Even if developing countries could eventually be granted compensation or allowed to retaliate through the DSB, compensation depends on the violator's willingness to negotiate, and smaller countries do not have the economic clout to force an

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<sup>70</sup> *WTO Dispute Settlement: Resolving Trade Disputes Between WTO Member*, WORLD TRADE ORG. (2014), [https://www.wto.org/english/thewto\\_e/20y\\_e/dispute\\_brochure20y\\_e.pdf](https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf).

<sup>71</sup> Gary Horlick & Judith Coleman, *A Comment on Compliance with WTO Decisions*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES* 773 (Merit E. Janow et al. eds., 2008).

<sup>72</sup> See Sarah R. Wasserman Rajec, *The Intellectual Property Hostage in Trade Retaliation*, 76(1) MD. L. REV. 169, 184–86 (2016) [hereinafter Wasserman Rajec].

<sup>73</sup> See Peter B. Rosendorff, *Stability and Rigidity – The Dispute Settlement Procedure of the WTO*, 99(3) AM. POL. SCI. REV. 389, 390-91 (2005) [hereinafter Rosendorff].

<sup>74</sup> *Id.*

<sup>75</sup> See James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11(3) REV. INT'L POL. ECON. 542, 547 (2004).

<sup>76</sup> See Eric Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948-1998*, 18, [https://www.iatp.org/sites/default/files/Aggressive\\_Multilateralism\\_The\\_Determinants\\_of.pdf](https://www.iatp.org/sites/default/files/Aggressive_Multilateralism_The_Determinants_of.pdf).

<sup>77</sup> Herik Horn et al, *Is the Use of the WTO Dispute Settlement System Biased?* 13 (CEPR Discussion Paper No 2340, 1999), <https://econpapers.repec.org/paper/cprceprdp/2340.html>.

economic powerhouse like the United States or China to comply.<sup>78</sup> Furthermore, there is a backlash associated with retaliation. Besides hurting the violating Member, the further curbing of trade will hurt the complainant's own economy, including individual economic actors in that country.<sup>79</sup> By reducing imports, the country is hurting its own production market, which in turn will negatively impact its competitiveness in the global economy.<sup>80</sup> Retaliating alone is often a losing battle for developing countries.

The impact of retaliation backlash will be particularly disparate for smaller developing countries. Imposing tariffs on their chief importers would be potentially ruinous to their economy, especially if the measure blocked the importation of food or essential component parts such as screws.<sup>81</sup> This situation was demonstrated in *EC — Bananas*, where Ecuador had little power to influence the European Union to change its WTO non-compliant policies and, in fact, could have fared much worse had it decided not to exercise retaliation, knowing it would have little effect and only hurt Ecuador itself.<sup>82</sup> “The suspension of concessions is not in the economic interest of either [party],” but it can rebound and hurt the weaker party more.<sup>83</sup> In fact, larger countries may retaliate in non-trade related ways, such as cutting off economic or humanitarian aid.<sup>84</sup>

## V. STRATEGIES FOR GREATER COMPLIANCE

The Doha Ministerial Conference was charged with revising the WTO dispute settlement procedure in line with earlier discussions leading up to and following the Seattle Ministerial Conference in 1999.<sup>85</sup> While the Doha Round raised a variety of suggestions for improvements, including greater Panel and Appellate Body transparency, and increased political control over the adoption of reports, the

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<sup>78</sup> Asim Imdad Ali, *Non-Compliance and Ultimate Remedies Under the Dispute Settlement System*, 14 J. PUB. & INT'L AFF. 15 (Spring 2003) (“The threat and economic impact arising when a developing country raises barriers against a large industrial economy is generally not significant”).

<sup>79</sup> ZIMMERMANN, *supra* note 66, at 156-57.

<sup>80</sup> *Id.* at 157.

<sup>81</sup> See e.g., Chad P. Brown et al., *Trump's Steel Tariffs have hit Smaller and Poorer Countries the Hardest*, PETERSON INST. INT'L ECON. (Nov. 15, 2018), <https://piie.com/blogs/trade-investment-policy-watch/trumps-steel-tariffs-have-hit-smaller-and-poorer-countries>.

<sup>82</sup> See Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997) [hereinafter *EC — Bananas*].

<sup>83</sup> Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 343 (2000).

<sup>84</sup> See *id.* at 338 (quoting *EC — Bananas* (22.6), *supra* note 48, ¶ 2.13).

<sup>85</sup> See generally, ZIMMERMANN, *supra* note 66, at 93-111.

negotiations largely came to nothing.<sup>86</sup> The General Council did reaffirm its commitment to improve the dispute settlement system,<sup>87</sup> however, this is the longest the WTO Agreement, or its predecessor, the GATT, have gone since being revised by a Ministerial Conference.<sup>88</sup>

#### *A. Specific Reporting Requirements*

One suggestion during the Doha Round was instituting specific reporting requirements for the Member in breach.<sup>89</sup> Within six months of adopting the Panel or Appellate Body report, the Member would have to submit regular reports on the progress of implementing the recommendations and rulings until the parties agree that the issue has been remedied.<sup>90</sup>

If the breaching party did not cooperate, the compensation or retaliation structures would activate in the same way as they already do under the DSU.<sup>91</sup> While reporting requirements would better show whether the country has taken steps to comply with the WTO Agreement,<sup>92</sup> it would not apply any more pressure on Members to actually comply with the WTO Agreement.<sup>93</sup> If a country wishes to continue to defy the WTO rules, it will keep doing so, even if it reports that it is violating such rules. If the country is not afraid of the consequences, extra reporting requirements will not cow it into submission. While transparency in

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<sup>86</sup> See *The Doha Round Finally Dies a Merciful Death*, FIN. TIMES (Dec. 21, 2015), <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879>.

<sup>87</sup> See World Trade Organization, Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579 (2004).

<sup>88</sup> See Jacob M. Schlesinger, *How China Swallowed the WTO*, WALL ST. J. (Nov. 1, 2017.), <https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308>.

<sup>89</sup> World Trade Organization, Special Session of the Dispute Settlement Body, art. 21.6(b), WTO Doc. TN/DS/9 (June 6, 2003).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See CRAIG VANGRASSTEK, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* 271 (2013) (“When members are required to report on their own measures, and are also subject to periodic reviews and regular monitoring, both they and the larger community in which they form a part may be more likely to catch potential violations of commitments either before they take place or, if they have been enacted, before some trading partner feels compelled to raise the matter in the Dispute Settlement Body”).

<sup>93</sup> Hui Chen & Eugene Soltes, *Why Compliance Programs Fail – and How to Fix Them*, HARV. BUS. REV., (Mar.-Apr. 2018), <https://hbr.org/2018/03/why-compliance-programs-fail> (noting that entities can report only what they want seen or ignore the actual implementation rates even if they have a policy).

reporting may be helpful for other reasons,<sup>94</sup> it is unlikely to lead to greater compliance. By not adding any stronger punishment, this measure would just encourage more information on violations without giving any greater impetus for compliance. This might make WTO Members aware of non-compliance sooner, but it would not fix the problem of non-compliance itself.

### B. Earlier Retaliation

Another idea is moving the determination of the level of nullification and the reciprocal level of retaliation earlier in the dispute settlement process.<sup>95</sup> Such a move would likely shorten the dispute settlement process and may force earlier compromise.<sup>96</sup> The current dispute settlement process takes about three years, effectively creating a three-year 'free pass' for countries violating the WTO law.<sup>97</sup> Allowing earlier retaliation would shrink the benefit of the 'free pass' period for violating countries.

Such a change, however, could lead to an arms race in retaliation.<sup>98</sup> Moving the retaliation process earlier would mean that the permission to retaliate may be revoked if the Appellate Body later finds that the defendant actually was in compliance with the WTO Agreement. That Member would then be incentivized to file for retaliation in response to the premature sanctions the initial complainant imposed on it. Earlier retaliation would create the opportunity for messy and needless retaliation battles. In addition, if the retaliation methods themselves are unchanged, even earlier retaliation would probably lead to the same level of compliance as later retaliation. Therefore, earlier retaliation would not be a stronger deterrent; instead, it would just create a messy system of premature retaliation and counter retaliation.

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<sup>94</sup> See e.g., Sijie Chen, *China's Compliance with WTO Transparency Requirement: Institution-Related Impediments*, 4(4) AMSTERDAM L.F. 25 (2012).

<sup>95</sup> See e.g., World Trade Organization, *Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes (Mexico)*, WTO Doc. TN/DS/W/40 (Jan. 27, 2003); World Trade Organization, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding (Ecuador)*, WTO Doc. TN/DS/W/26 (Nov. 26, 2002).

<sup>96</sup> ZIMMERMANN, *supra* note 66, at 154-55.

<sup>97</sup> John H. Jackson, *The Case of the World Trade Organization*, 84(3) INT'L AFF. 437, 452 (2008) [hereinafter Jackson].

<sup>98</sup> For example, a WTO litigation arms race is already underway over American tariffs and the retaliatory tariffs countries have applied in return outside of the WTO framework. See, e.g., David Lawder, *U.S. Launches Five WTO Challenges to Retaliatory Tariffs*, REUTERS (July 17, 2018), <https://www.reuters.com/article/us-usa-trade-wto/u-s-launches-five-wto-challenges-to-retaliatory-tariffs-idUSKBN1K62GT>.



### *C. Carousel Retaliation*

Another suggestion, first raised in 1999, is carousel retaliation.<sup>99</sup> Carousel retaliation would allow a retaliating Member to rotate the list of products subject to retaliation in the hope that this would pressure the violating Member to comply with the WTO Agreement.<sup>100</sup> The unpredictability of this system was a concern for Members such as the European Union,<sup>101</sup> but this very unpredictability could make retaliation a greater weapon by applying pressure on a wider number of domestic industries of the violating country.

Carousel retaliation's greatest strength is its unpredictability and ability to strike at a variety of different industries.<sup>102</sup> This strategy might apply pressure on several different industries, encouraging more lobbying to force a change in the infringing Member's policy.<sup>103</sup> Industries that have not been affected yet might also agitate for a change to avoid the hammer of carousel retaliation striking them next.

While this could apply more pressure on the government to comply with DSB decisions, it could also encourage industries to endure and wait for the retaliation to move to a different article of trade. Similarly, it would still be limited to a set number of trade articles at a time, increasing the range but not the strength of the retaliation. The unpredictability could also backfire by harming a larger number of consumers and producers in the retaliating country as well.<sup>104</sup> Furthermore, carousel retaliation has proved a deeply unpopular idea, and has only been wholeheartedly endorsed by the United States.<sup>105</sup>

### *D. Cross-Retaliation*

Several developing countries have suggested the alternative of cross-retaliation, where they get to choose the sector in which they will suspend concessions, as a

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<sup>99</sup> ZIMMERMANN, *supra* note 66, at 159.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 160.

<sup>102</sup> See LENORE SEK, CONG. RESEARCH SERV., RS20715, TRADE RETALIATION: THE "CAROUSEL" APPROACH 1 (Mar. 5, 2002), <http://www.iwar.org.uk/news-archive/crs/9099.pdf>.

<sup>103</sup> ZIMMERMANN, *supra* note 66, at 159.

<sup>104</sup> SEK, *supra* note 102, at 6.

<sup>105</sup> Bryan Mercurio, *Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are There Really Alternatives?*, in TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT 397, 440 (James C. Hartigan ed., 2009).

way to balance the scales for developing countries.<sup>106</sup> The WTO primarily authorizes retaliation under the violated agreement.<sup>107</sup> This means, for example, that a GATT violation would be met with suspension of concessions in goods, and not services or intellectual property. This system creates an imbalance between countries. Developing countries are mostly producing goods, which would be covered under the GATT, while larger economic powerhouses such as the United States or the European Union have an increasingly high percentage of their trade in services and/or intellectual property, covered by the separate agreements of GATS and TRIPS respectively.<sup>108</sup> Therefore, it is almost impossible for a developing country, with little to no service or intellectual property trade of its own, to retaliate against this rich vein of trade wealth of larger countries.

While the ‘same category of trade’ retaliation is the main retaliation system, it is not the only one. Under the current version of the WTO Agreement, if retaliation in the same trade sector is not effective, countries can resort to cross-retaliation.<sup>109</sup>

More readily allowing cross-retaliation, or retaliation against trade in a different sector, is a potential solution to the imbalance in power between developing and developed countries under the DSU. Several scholars have particularly advocated for cross-retaliation in regards to intellectual property.<sup>110</sup> Intellectual property includes highly lucrative copyrights and patents, which are almost exclusively held by wealthy countries, such as China, the United States, Japan, Korea, and members of the European Union.<sup>111</sup> The ability to nullify these intellectual property rights in the complaining country is more likely to actually affect wealthy countries and to spur the powerful industries that have lucrative copyrights and patents to lobby the government for compliance.<sup>112</sup>

In practice, however, TRIPS cross-retaliation has not proved very effective. For example, it was approved in *EC — Bananas* for Ecuador against the European

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<sup>106</sup> World Trade Organization, Dispute Settlement Understanding Proposals: Legal Text (India), WTO Doc. TN/DS/W/47 (Feb. 11, 2003).

<sup>107</sup> DSU, *supra* note 9, at art. 22.3(a).

<sup>108</sup> See *Participation of Developing Countries in World Trade: Overview of Major Trends and Underlying Factors*, WORLD TRADE ORG. (Aug. 16, 1996), [https://www.wto.org/english/tratop\\_e/devel\\_e/w15.htm#Footnote9](https://www.wto.org/english/tratop_e/devel_e/w15.htm#Footnote9); Edward Gresser, *U.S. Share of World Intellectual Property Revenue – 39 Percent*, PROGRESSIVE ECONOMY (Nov. 5, 2014), [http://www.progressive-economy.org/trade\\_facts/u-s-share-of-world-intellectual-property-revenue-39-percent/](http://www.progressive-economy.org/trade_facts/u-s-share-of-world-intellectual-property-revenue-39-percent/).

<sup>109</sup> DSU, *supra* note 9, at art. 22.3(b), (c).

<sup>110</sup> See Wasserman Rajec, *supra* note 72, at 197–98.

<sup>111</sup> See *e.g.*, World Intellectual Property Organization, WORLD INTELLECTUAL PROPERTY INDICATORS 2017 30.

<sup>112</sup> See Wasserman Rajec, *supra* note 72, at 198.

Union, but Ecuador did not actually use it and settled for the European Union lowering its tariffs twenty years in the future.<sup>113</sup> In *United States — Gambling*, the Appellate Body authorized Antigua to suspend American copyrights, yet Antigua has not taken any action and the illegal American trade measure remains in place.<sup>114</sup> In *United States — Cotton*, Brazil received the right to suspend American pharmaceutical patents, but ended up settling for cash rather than pursuing patent suspension.<sup>115</sup> In all of these cases, there was a power differential between the parties and the country with intellectual property retaliation rights could not pose a credible threat, making cross-retaliation a hollow tool.<sup>116</sup> These cases undermine the argument that TRIPS retaliation, at least by itself, will lead to compliance. In fact, it reinforces the notion that wealthy countries will just price out or will not be affected enough to be forced into compliance with the WTO laws.

#### *E. Collective Retaliation*

The African Group suggested the alternative of collective retaliation as a way to help developing countries have greater economic power in enforcing compliance with the WTO Agreement.<sup>117</sup> Under this method, if a developed Member breached its obligations to a developing Member, all the WTO Members would be allowed to retaliate.<sup>118</sup> Related to this suggestion is the idea of a class action, where all countries affected by the measure could retaliate.<sup>119</sup> Both methods would allow the collective power of many developing states to combine and bear down on the violating Member.

At first glance, collective retaliation provides a strong alternative to the current retaliation regime. Collective retaliation would undoubtedly provide a stronger deterrent to violating the WTO provisions. It also specifically focuses on empowering economically weaker countries in the dispute settlement procedures.

Collective retaliation, as suggested by the African Group, and class actions would have to be formally adopted as amendments to the WTO Agreement by the WTO Membership. Since the DSU does not have a provision for collective retaliation, it would have to be added to the WTO Agreement through an amendment.

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<sup>113</sup> *Id.* at 201; *EC Bananas*, *supra* note 48.

<sup>114</sup> Arbitrator Decision, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/ARB (adopted Dec. 21, 2007).

<sup>115</sup> Arbitrator Decision, *United States — Subsidies on Upland Cotton*, WTO Doc. WT/DS267/ARB/2 (adopted Aug. 31, 2009).

<sup>116</sup> Wasserman Rajec, *supra* note 72, at 208.

<sup>117</sup> World Trade Organization, Negotiations on the Dispute Settlement Understanding (African Group), WTO Doc. TN/DS/W/15 (Sept. 15, 2002).

<sup>118</sup> *Id.*

<sup>119</sup> Cai, *supra* note 14, at 158-59.

Amendments require the high burden of unanimous approval by all WTO Members,<sup>120</sup> which makes collective retaliation, despite its potential promise, highly unlikely. This suggestion provoked staunch opposition and did not make it onto the Doha Round draft.<sup>121</sup> It conjures up images of punitive action rather than the WTO ideals of compliance.<sup>122</sup> So while collective retaliation is a potentially powerful retributory system, it is unlikely to be achieved through amending the WTO Agreement.

#### F. Injunctions

Mexico has suggested the alternative of instituting an injunction system where the panel could rule that the measure in question should be suspended until the Panel issues its final report.<sup>123</sup> Injunctions would have the benefit of stopping the offending behaviour immediately instead of suffering through the three-year ‘free period’.<sup>124</sup> This would also go towards the WTO goal of compliance with the WTO Agreement as quickly as possible.

However, the injunction doesn’t actually increase the strength of deterrence. It would merely move the current WTO enforcement mechanisms earlier. One potential benefit of an injunction would be that it could be used in tandem with other suggested changes to the WTO dispute settlement system. For instance, with collective retaliation, it is unlikely that the WTO Membership would adopt injunctions. The suggestion faced significant pushback as being too radical of a change and was not adopted in the final text of the Doha Round.<sup>125</sup> Of course, as mentioned earlier, the mere task of getting consensus among all WTO Members to pass such an amendment would also be extremely unlikely.<sup>126</sup>

The potential unintended consequences of injunctions would also militate against adopting such a system. The injunction system could encourage more frivolous litigation for the purpose of stopping trade measures or applying pressure on other countries. There would also be the issue of how to compensate countries when an

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<sup>120</sup> WTO Agreement, *supra* note 21, at art. X(8).

<sup>121</sup> ZIMMERMANN, *supra* note 66, at 161.

<sup>122</sup> M.S. Korotana, *Collective Retaliation and the WTO Dispute Settlement System*, 10(1) ESTEY CTR. J. INT’L L. & TRADE POL. 196, 204–05 (2009).

<sup>123</sup> World Trade Organization, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding (Mexico), WTO Doc. TN/DS/W/23 (Nov. 4, 2002).

<sup>124</sup> See Jackson, *supra* note 97, at 452.

<sup>125</sup> ZIMMERMANN, *supra* note 66, at 165.

<sup>126</sup> Nicolas Lamp, *Three Scenarios for the Future of the WTO Appellate Body, or: Why WTO Members Should Start Negotiating a DSU 2.0*, INT’L ECON. L. & POL’Y BLOG (Apr. 15, 2019), <https://worldtradelaw.typepad.com/ielpblog/2019/04/three-scenarios-for-the-future-of-the-wto-appellate-body-or-why-wto-members-should-start-negotiating.html>.

injunction is incorrectly granted. In addition, the implications for further loss of sovereignty beyond what the WTO Members have agreed upon would only exacerbate the pre-existing arguments that the WTO infringes on state sovereignty.<sup>127</sup>

## VI. REPEAT VIOLATOR POLICY

### *A. The Policy*

A new suggestion to improve compliance with the WTO Agreement is instituting a repeat violator policy into the practices of the DSB. A repeat violator policy would punish the infringing Member comparatively more depending on the number of violations during a given period of time. Repeat violator policies are used in a variety of other areas of law to counter the type of problem raised by habitual offenders, which is the danger raised by American President Trump and other anti-WTO leaders of economic powerhouses, whether now or in the future.

For example, repeat infringer policies are required under the U.S. Digital Millennium Copyright Act for online third-party platforms to escape liability.<sup>128</sup> These can take the form of either a set number of strikes before being banned from the website,<sup>129</sup> or a graduated response of progressively harsher punishments.<sup>130</sup> This approach balances the rights of copyright owners and copyright users, and has been effective at stopping repeat infringers.<sup>131</sup> For example, in *Ventura Content, Ltd. v. Motherless, Inc.*, the website owner, only a small business, had terminated the accounts of over thousand repeat infringers.<sup>132</sup> U.S. courts have struck down repeat infringer policies that are too lenient on repeat infringers.<sup>133</sup>

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<sup>127</sup> See e.g., Kyle Bagwell & Robert Staiger, *National Sovereignty in the World Trading System*, 22(4) HARV. INT'L R. 54 (2001).

<sup>128</sup> 17 U.S.C. § 512(i) (2018).

<sup>129</sup> See e.g., *Enforcement Actions for Intellectual Property Rights Infringements Claims on Alibaba.com*, ALIBABA, <https://rule.alibaba.com/rule/detail/2043.htm> (laying out a three-strike suspension policy for intellectual property violations).

<sup>130</sup> *Comcast's DMCA Repeat Infringer Policy for Xfinity Internet Service*, COMCAST, <https://www.xfinity.com/support/articles/comcast-dmca-compliance-policy> (last visited Nov. 3, 2018) (setting out a multi-tier repeat infringer policy going from persistent on-screen notice to suspension and finally to termination).

<sup>131</sup> See Katherine Oyama, *Why the Digital Millennium Copyright Act Is Working Just Fine*, DIGITAL MUSIC NEWS (Apr. 10, 2014), <https://www.digitalmusicnews.com/2014/04/10/dmcaworkingjustfine/>.

<sup>132</sup> *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 602 (9th Cir. 2018).

<sup>133</sup> *BMG Rights Management LLC v. Cox Communications, Inc.*, 881 F.3d 293, 299 (4th Cir. 2018).

There are also repeat offender laws in U.S. criminal law, including the well-known three-strikes laws.<sup>134</sup> While these criminal repeat offender laws may not be as successful as advocates had hoped, they did increase deterrence to at least a degree and would be improved through meaningful review.<sup>135</sup> Notably, it is not just the U.S. that has instituted such laws. For example, countries such as the European Union,<sup>136</sup> South Korea,<sup>137</sup> and Brazil,<sup>138</sup> have also instituted repeat offender laws in a variety of areas. Thus, there is strong logic behind this principle that is recognized internationally, even if these laws have been applied poorly in some cases.

A graduated response repeat violator policy, where each violation results in larger retaliation, could create greater deterrence for the WTO as well. As the DSU currently stands, whether a country violates the WTO Agreement one time or a hundred times, the punishment is the exact same, a judgment that may lead to equivalent retaliation. Particularly for wealthier countries that can price out of complying with the WTO Agreement,<sup>139</sup> equal punishment as per the crime does not result in deterrence for larger violations.

The WTO Agreement is largely built on the wilful compliance of Members. That is what makes American President Trump's slew of illegal tariffs so damaging. A concerted effort to defy the WTO, at least with the current DSU, would knock the whole WTO structure down.<sup>140</sup> Such a danger needs an equally threatening response.

A WTO repeat violator policy would create gradually stronger responses to repeated non-compliant behaviour. For example, if Country X were only found to violate the WTO Agreement once in several years, the DSU system would act as it

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<sup>134</sup> See Ian Ayres, Michael Chwe, & Jessica Ladd, *Act-Sampling Bias and the Shrouding of Repeat Offending*, 103 VA. L. REV. ONLINE 94 (2017); see, e.g., *Ewing v. California*, 538 U.S. 11 (2003).

<sup>135</sup> See e.g., Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, ABA (Apr. 1, 2002), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol29\\_2002/spring2002/hr\\_spring02\\_vitiello/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello/).

<sup>136</sup> Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, Ref. Ares (2016) 3934515 (July 26, 2016).

<sup>137</sup> Jeojakkwonbeop [Korean Copyright Act], Act No. 9785, July 31, 2009, art. 133-2 (S. Kor.); see also Sun-Young Moon & Daep Kim, *The "Three Strikes" Policy in Korean Copyright Act 2009: Safe or Out?*, 6(3) WASH. J. L., TECH. & ARTS 171 (2011).

<sup>138</sup> Lei No. 11.343 [New Drug Law] No. 11,343/2006, Aug. 23, 2006 (Braz.).

<sup>139</sup> See Rosendorff, *supra* note 73, at 390-91.

<sup>140</sup> Martin Hesse, *WTO Faces Existential Threat in Times of Trump*, SPIEGEL (June 30, 2018), <http://www.spiegel.de/international/world/world-trade-organization-in-trouble-amid-trump-trade-war-a-1215802.html>.

currently does. However, if Country Y launches several measures that violate the WTO Agreement in a short period of time, this would trigger the repeat violator policy and the Members who are unfairly affected by the illegal measures would be given a wider range of retaliation abilities if compliance is not forthcoming.

This would involve several steps. The first part of this repeat violator policy would be allowing all countries negatively affected by the illegal measure (or measures) to retaliate. The second step would be to allow the combined countries to strike at an increasingly large number of the non-compliant Member's trade sectors. The DSB would take sustained violations into account in determining if this is a repeat violator, and if so, how much retaliation is appropriate. In addition, the DSB would take 'intent' into consideration. In the case of President Trump, for instance, his clear intent to damage the WTO<sup>141</sup> would be a consideration in favour of greater retaliation. This repeat violator policy would thus meet the WTO's goal of pressuring Members to comply earlier to avoid larger, more crippling retaliation.

An additional benefit of a repeat violator policy is that it would not block any other suggested innovation from working too. In fact, the repeat violator policy would likely work best in tandem with aspects of carousel retaliation, cross retaliation, and collective retaliation. Therefore, it does not block later improvements to the dispute settlement procedures.

One potential problem would be that developing countries do not file complaints with the WTO as much as wealthy countries. However, while developing countries did not use Article 21.5 complaints for the first nine years of the WTO, they have since been using them with increasing frequency.<sup>142</sup> Providing developing countries with a vehicle to fight on a more even playing field with wealthy violating countries is also likely to boost their confidence that their actions would actually make a difference. The bandwagon effect is also helpful. When one Member files a complaint, other Members are likely to join in.<sup>143</sup>

Of course, the hope would be that the repeat violator policy would never have to be used. Few WTO disputes lead to retaliation, as usually the Member that is in violation comes into compliance.<sup>144</sup> Retaliation has only been used sparingly in the past: from 1995 to 2013, there were only thirty-six requests for retaliation for non-

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<sup>141</sup> See e.g., Hanke, *supra* note 20; James Kosur, *Leaked Document Shows Trump Wants To Destroy WTO Relationship*, HILL REPORTER (July 2, 2018), <https://hillreporter.com/leaked-document-shows-trump-wants-to-destroy-wto-relationship-3281>.

<sup>142</sup> ZIMMERMANN, *supra* note 66, at 74-75.

<sup>143</sup> *Id.* at 86.

<sup>144</sup> See generally, Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10(2) J. INT'L ECON. L. 397 (2007).

compliance.<sup>145</sup> There would be no greater risk under the repeat violator system to WTO-compliant countries than before. The repeat violator policy would strike only at those especially egregious non-compliant Members such as the Trump White House, whose very actions threaten to undermine the entire WTO.

### *B. Implementation*

Another benefit of introducing a repeat violator policy into the DSU is that it could potentially be implemented without a formal amendment. Amendments are a major stumbling block to innovation in the WTO, since there needs to be consensus among all 164 Members for an amendment to the WTO Agreement to be implemented,<sup>146</sup> which would be enormously difficult. This is a major reason why the alternatives of collective retaliation and injunctions are unlikely to be successful.

The key to avoiding the formal amendment process is the ambiguous language in the DSU itself. DSU Article 22.4 stipulates that the “level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment”.<sup>147</sup> While this language is constraining it, the rest of the DSU does not actually define equivalence, nor does it say anything about only allowing one area of trade retaliation. In fact, Article 22.4 says it should be “equivalent to the level of the nullification or impairment”.<sup>148</sup>

There is no definition of “equivalent” in the DSU or any other part of the WTO Agreement; even context and state practice do not provide any clues to its true meaning.<sup>149</sup> The non-binding, but informative, WTO’s Handbook on the WTO Dispute Settlement System says “equivalent” means “that the complainant’s retaliatory response may not go beyond the level of the harm caused by the

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<sup>145</sup> Diego Bonomo, *Hitting Where it Hurts: Retaliation Requests in the WTO*, VOX (Mar. 1, 2014), <https://voxeu.org/article/retaliation-wto>.

<sup>146</sup> WTO Agreement, *supra* note 21, at art. X(8).

<sup>147</sup> DSU, *supra* note 9, at art. 22.4.

<sup>148</sup> *Id.*

<sup>149</sup> See generally, Memorandum from Thibault Fresquet, Kai Kan, & Farzan Sabet to the Permanent Mission of Canada, *Retaliation under the WTO system: When does Nullification or Impairment Begin?* (Nov. 21, 2016), <https://georgetown.app.box.com/s/a1edn1ep3ch86tnss53wvvyev2g05p0w>; see also Henrik Horn & Petros C. Mavroidis, *Remedies in the WTO Dispute Settlement System and Developing Country Interests*, 3.4.2 (Apr. 11, 1999), [https://www.iatp.org/sites/default/files/Remedies\\_in\\_the\\_WTO\\_Dispute\\_Settlement\\_System\\_.htm](https://www.iatp.org/sites/default/files/Remedies_in_the_WTO_Dispute_Settlement_System_.htm); Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48(2) HARV. INT’L L.J. 338, 343 (2007).



respondent".<sup>150</sup> Harm is a subjective measure, and it would be nearly impossible to calculate the exact amount of harm flowing from a violation's resulting trade reverberations and economic and political effects.<sup>151</sup> Particularly given the lack of an Appellate Body for retaliation arbitration panels, there is a multitude of interpretations for what "equivalent" might mean and no singular definition has been mandated.<sup>152</sup> For example, one arbitration panel that directly engaged the meaning of "equivalence" found that it is in reference to the level of WTO-inconsistency, which is nebulous at best.<sup>153</sup>

The ambiguity of the terms lends support to the repeat infringer policy. The terms "nullification and impairment" would seem to give some sort of benchmark, but they have also been defined so differently as to render a comprehensive definition elusive.<sup>154</sup> None of the three central terms (equivalent, nullification, and impairment) are actually defined by the WTO Agreement or given an authoritative definition by the WTO panels. Several panels have rooted their understanding of equivalence in quantitative terms; for example, if the violation causes \$100 million in economic losses, retaliation can be up to \$100 million.<sup>155</sup> Yet in *US – Anti-Dumping Act of 1916*, the Article 22.6 panel determined that qualitative equivalence would be determined by looking at the "trade or economic effects" of the act.<sup>156</sup> This decision spoke in broad terms about the qualitative damage of the infringing activity rather than in specific numbers of economic harm.<sup>157</sup> The repeat violator policy is in line with this qualitative reasoning. Nullification and impairment could be broadly interpreted to refer to the degree of nullification and impairment not

<sup>150</sup> WTO, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 82 (2004).

<sup>151</sup> See Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9(2) J. INT'L ECON. L 383, 423 (2006).

<sup>152</sup> See David Jacyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, 15 AUSTL. INT'L L. J. 235, 253 (2008).

<sup>153</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, ¶ 4.8, WTO Doc. WT/DS27/ARB (adopted Apr. 9, 1999); see also *EC — Bananas (22.6)*, *supra* note 48, ¶ 159 (limiting the estimation of Ecuador's losses in actual and potential trade and trade opportunities in the relevant goods and service sectors).

<sup>154</sup> Sebastian, *supra* note 149, at 343 n. 36; see also *WTO Analytical Index: DSU – Article 22 (Jurisprudence)* 40-42, [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/dsu\\_art22\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art22_jur.pdf) [hereinafter WTO Analytical Index] (including a number of different decisions on equivalence, both defined quantitatively and qualitatively, that differ from each other).

<sup>155</sup> See *WTO Analytical Index*, *supra* note 154, at 40-41.

<sup>156</sup> *US – Anti-Dumping Act of 1916, Recourse to Arbitration by the United States under Article 22.6 of the DSU*, ¶ 5.23, WTO Doc. WT/DS136/ARB (adopted Feb 24, 2004); see also WTO Analytical Index, *supra* note 154, at 41-42 (describing other cases that support the qualitative equivalence approach).

<sup>157</sup> See *id.*

just to the complainant state, but also to the entire WTO system, looking at repeat offenses to determine the degree of threat to the WTO. The repeat violator policy would continue to allow flexible interpretations by panels, but it would look at the actual violation and how frequently the country has violated in the recent past to determine the level of equivalence, which could be much higher than just looking at the level of economic damage from the violation at hand.

Therefore, if a Member flagrantly violates the WTO repeatedly with the goal of weakening it, it is arguable that this is an extreme degree of nullification and impairment that warrants an equally extreme response under the language of the DSU. Particularly helpful for developing countries, Article 21.8 notes that the DSU shall also consider the impact of WTO-inconsistent actions on the economy of the developing country.<sup>158</sup> This new repeat violator system would be especially useful in giving developing countries support to retaliate against flagrant violations of the WTO Agreement by allowing retaliation in more sectors and by more Members. This argument is lent further support by Article 3.2, which states that the DSU is “a central element in providing security and predictability to the multilateral trading system.”<sup>159</sup> A Member flagrantly ignoring the current DSU retaliation system undermines the entire WTO, giving weight to a greater degree of nullification and impairment to the WTO. Finally, Article 22.3 also provides support as it considers effectiveness of the suspension in determining the concession to be suspended by the target state.<sup>160</sup>

Treaty interpretation standards support allowing repeat violator policy without the need for a formal amendment. Under the Vienna Convention on the Law of Treaties, the terms of a treaty should be interpreted in good faith according to their ordinary meaning and in terms of their context, object, and purpose.<sup>161</sup> The preamble of the WTO Agreement explicitly states that the purpose of the WTO is “elimination of discriminatory treatment in international trade relations”.<sup>162</sup> Furthermore, the preamble recognizes the need to help developing countries share in international trade.<sup>163</sup> While the DSU is about “governing the settlement of disputes,”<sup>164</sup> Article 3.2 states that the DSU is a central element to holding up the multilateral trading system,<sup>165</sup> implying that it has a much greater purpose than just resolving disputes: maintaining the WTO itself. These purposes give context

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<sup>158</sup> DSU, *supra* note 9, at art. 21.8.

<sup>159</sup> *Id.* at art. 3.2.

<sup>160</sup> *Id.* at art. 22.3.

<sup>161</sup> Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>162</sup> WTO Agreement, *supra* note 21, at pmb1.

<sup>163</sup> *Id.*

<sup>164</sup> DSU, *supra* note 9; *see also* WTO Agreement, *supra* note 21, at arts. 3.3 and 3.7.

<sup>165</sup> *Id.* at art. 3.2.

surrounding the DSU and support the proposition that it should be interpreted in a way to enforce compliance with the WTO and provide strength to developing countries to protect their WTO trade interests. In addition, with none of the three central terms relating to retaliation (equivalent, nullification, and impairment) actually defined by the WTO Agreement or given an authoritative definition by the WTO panels, there is substantial leeway for what these terms could mean since we are not bound by the non-existent clear intent under the treaty.<sup>166</sup> The repeat violator policy would thus be directly in line with and would further the purposes of the WTO Agreement.

Even if the repeat violator policy must be implemented through the amendment process, passing an amendment might be possible. The current weak WTO dispute settlement system poses serious dangers to the continued vitality of the WTO and change is certainly needed.<sup>167</sup> This impetus for a substantive change to the dispute resolution system could be used to make a stronger push for amending the DSU to include a repeat violator policy. Also, unlike with collective retaliation or injunctions, the repeat violator policy would be limited to only affecting the worst, most flagrant offenders. This would make it more palatable to the WTO Membership at large. However, as it stands now, flagrant opponents of the WTO such as President Trump would likely block any such amendment. So, while it would be ideal to codify the repeat violator policy in the WTO, for the time being, taking advantage of ambiguities and the goal of maintaining the global multilateral trading system must provide a basis for the repeat violator policy that shall protect the crumbling WTO system.

## VII. CONCLUSION

The rise of anti-WTO leaders in powerful countries is a new and dangerous phenomenon that needs an innovative solution. The Doha Round fell apart and failed to deliver a substantive change to the DSU. While suggestions such as cross-retaliation or injunctions have their merits, they are not created with a serial WTO violator in mind and would be unlikely to be adopted. A repeat violator policy, on the other hand, is directly calibrated to this risk and could likely be implemented by the DSB directly rather than the difficult formal amendment process. It is true that almost certainly one hundred per cent compliance with the WTO Agreement will remain elusive.<sup>168</sup> However, the DSB needs to use an innovative strategy tailored to today's problems to preserve the WTO in the face of the most serious threat it has encountered since its creation. The repeat violator policy is that strategy.

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<sup>166</sup> Vienna Convention, *supra* note 161, at, art. 31(1).

<sup>167</sup> See Reich, *supra* note 68, at 31.

<sup>168</sup> See Wasserman Rajec, *supra* note 72, at 184–85.